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No. 02-1315 SEP 8 -2003

In the
Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE FAIRNESS FOUNDATION *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

KENNETH W. STARR
Counsel of Record
ROBERT R. GASAWAY
ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Attorneys for Amicus Curiae The Fairness Foundation

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QUESTION PRESENTED

Where a State chooses to award scholarships based on neutral criteria to financially needy, academically gifted students, does the State violate the First and Fourteenth Amendments to the U.S. Constitution when it discriminatorily strips the scholarship from an otherwise eligible student for the sole reason that the student declares a major in theology taught from a religious perspective.

TABLE OF CONTENTS

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTRODUCTION AND INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. MULTIPLE CONSTITUTIONAL PROVISIONS PROHIBIT DISCRIMINATION ON THE BASIS OF RELIGION 6

II. THE WASHINGTON SCHOLARSHIP PROGRAM UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF RELIGION 14

A. Washington's Viewpoint-Based Restriction On The Use Of Promise Scholarship Funds Is Discriminatory In Both Purpose And Effect 15

1. The Manifest Purpose Of The Restriction Is To Discriminate 15

2. The Effect Of The Restriction Is To Discriminate 17

B. Washington's Viewpoint-Based Restriction Fails To Pass Muster Under Multiple Constitutional Doctrines 20

III. WASHINGTON HAS NOT ADVANCED ANY LEGITIMATE REASON FOR DISCRIMINATING ON THE BASIS OF RELIGION 24

A. Washington Has No Constitutionally Protected Interest In Selectively Funding Certain Religious Views 25

B. Eliminating Washington's Discrimination Against Religion Would Provide More, Not Less, Separation Of Church And State 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Agostini v. Felton,
521 U.S. 203 (1997) 4

Ambach v. Norwick,
441 U.S. 68 (1979) 19

Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,
512 U.S. 687 (1994) 6, 8, 20, 24, 30

Board of Educ. v. Mergens,
496 U.S. 226 (1990) 7, 9

Bowen v. Roy,
476 U.S. 693 (1986) 11, 12

Branti v. Finkel,
445 U.S. 507 (1980) 23

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 4, 7, 9, 10, 20, 26

Clark v. Jeter,
486 U.S. 456 (1988) 23

Corporation of Presiding Bishop v. Amos,
483 U.S. 327 (1987) 4, 14

Dandridge v. Williams,
397 U.S. 471 (1970) 26

Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) 4, 9, 10, 11, 12, 18, 20

Epperson v. Arkansas, 393 U.S. 97 (1968) 7

Everson v. Board of Educ., 330 U.S. 1 (1947) 8, 10

FCC v. League of Women Voters, 468 U.S. 364 (1984) 28

Goldman v. Weinberger, 475 U.S. 503 (1986) 11

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 15, 22

Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) 9, 12, 29

Grutter v. Bollinger, 123 S. Ct. 2325 (2003) 20

Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) 23

Harris v. McRae, 448 U.S. 297 (1980) 25

Hernandez v. Comm'r, 490 U.S. 680 (1989) 11

Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) 9, 11, 14

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 4, 12

Lane v. Wilson, 307 U.S. 268 (1939) 22

Larson v. Valente, 456 U.S. 228 (1982) 7

Lawrence v. Texas, 123 S. Ct. 2472 (2003) 26

Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) 25, 27, 28

Lynch v. Donnelly, 465 U.S. 668 (1984) 8

Lyng v. N.W. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988) 10, 11

Maher v. Roe, 432 U.S. 464 (1977) 25, 26

McCollum v. Board of Educ., 333 U.S. 203 (1948) 12

McDaniel v. Paty, 435 U.S. 618 (1978) 7, 13, 18, 21

Missouri v. Jenkins, 515 U.S. 70 (1995) 13

Mitchell v. Helms, 530 U.S. 793 (2000) 4, 15, 29

Moore v. City of East Cleveland,
431 U.S. 494 (1977) 26

Niemotko v. Maryland,
340 U.S. 268 (1951) 13, 21

Norwood v. Harrison,
413 U.S. 455 (1973) 29

Oyler v. Boles,
368 U.S. 448 (1962) 13

Police Dep't of Chicago v. Mosley,
408 U.S. 92 (1972) 23

Regan v. Taxation Without Representation of Washington,
461 U.S. 540 (1983) 25, 27

Roe v. Wade,
410 U.S. 113 (1973) 26

Romer v. Evans,
517 U.S. 620 (1996) 22

Rosenberger v. Rector and Visitors of the Univ. of Va.,
515 U.S. 819 (1995) 4, 9, 12, 23, 24, 28

Rust v. Sullivan,
500 U.S. 173 (1991) 24, 25, 28

Rutan v. Republican Party of Ill.,
497 U.S. 62 (1990) 26

Sch. Dist. of Abington Township v. Schempp,
374 U.S. 203 (1963) 7

Sherbert v. Verner,
374 U.S. 398 (1963) 11, 22

Speiser v. Randall,
357 U.S. 513 (1958) 27

Taxation Without Representation v. Regan,
676 F.2d 715 (D.C. Cir. 1982) 27

Thomas v. Review Bd. of Ind. Employment Sec. Div.,
450 U.S. 707 (1981) 9, 10, 11

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 22

United States v. American Library Ass'n,
123 S. Ct. 2297 (2003) 25

Walz v. Tax Comm'n,
397 U.S. 664 (1970) 2, 14

Widmar v. Vincent,
454 U.S. 263 (1981) 6, 12, 13, 24

Wisconsin v. Yoder,
406 U.S. 205 (1972) 11

Witters v. Washington Dep't of Servs. for the Blind,
474 U.S. 481 (1986) 9, 30

Zelman v. Simmons-Harris,
536 U.S. 639 (2002) 4, 9, 14, 15, 29

Zobel v. Williams,
457 U.S. 55 (1982) 13

Statutes

Wash. Admin. Code 250-80-020(12)(g) 1, 3

Wash. Rev. Code 28B.10.812 21

Wash. Rev. Code 28B.119.010(8) 1

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Hamburger, Philip. SEPARATION OF CHURCH AND STATE (2002).....16, 17

Marx, Karl. INTRODUCTION TO A CRITIQUE OF THE HEGELIAN PHILOSOPHY OF RIGHT (1844).....1

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INTRODUCTION AND INTEREST OF AMICUS[1]

This Court's religion decisions have been guided above all by one fundamental principle: The government's involvement with religion is limited to an evenhanded respect for all of the diverse beliefs of its citizens. The fundamental principle, in short, is one of nondiscrimination.

The State of Washington statutes and regulations invalidated below are infirm precisely because they depart from the Constitution's mandate of evenhandedness in favor of a viewpoint-based prohibition on the use of Promise Scholarships for the study of theology "taught from a religious perspective." Pet. App. 15a; *see also* Pet. Br. 5; Wash. Rev. Code 28B.119.010(8) (Pet. App. 95a); Wash. Admin. Code 250-80-020(12)(g) (JA 180). The irony of Washington State's discrimination-infected legal structure is this: devotees of Marxism may use Promise Scholarships to pursue degrees in accredited departments that school students in the idea that "religion is the opiate of the masses." Karl Marx, INTRODUCTION TO A CRITIQUE OF THE HEGELIAN PHILOSOPHY OF RIGHT (1844). But Christians, like respondent Joshua Davey, may *not* use their Promise Scholarships to pursue religious studies taking the view that faith offers a window onto the most profound truths about the human experience. Under current law, Promise Scholarships may be used to study religion from a standpoint of agnosticism, skepticism, condescension, or hostility. In

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[1] Pursuant to Supreme Court Rule 37.6, the Fairness Foundation states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the Fairness Foundation and its counsel, contributed monetarily to the preparation or submission of this brief. The Fairness Foundation is grateful to law students Daniel Kearney, Joe Novak, and Evan Young for their assistance in researching and preparing an early draft of this brief.

fact, Promise Scholarships may be used for the study of religion from every conceivable standpoint, *except* the most traditional, commonplace standpoint down through the ages—the standpoint of faith.

The Fairness Foundation respectfully submits this brief, its first before the Court, in order to explain, from its perspective, the constitutional infirmities of Washington's discriminatory treatment of faith-based religious viewpoints. The Fairness Foundation is deeply involved in private philanthropy aimed at the forging of public-private partnerships to remove obstacles that too often prevent poorer students from achieving adequate primary and secondary educations. The Fairness Foundation has learned, through experience gained in the course of fulfilling its mission, that some of the most persistent hurdles impeding assistance from reaching needy students trapped in underachieving schools is the commonplace misconception that our Constitution favors hostility—as opposed to benevolent neutrality, *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)—in matters of religion. The Fairness Foundation—and the needy students it seeks to assist—have vital stakes in ensuring this Court's adherence to the Constitution's mandate of religious evenhandedness.

SUMMARY OF ARGUMENT

1. This brief assumes the undisputed facts established in the record below. Most importantly, those facts establish, and the State of Washington does not deny, that Washington revoked Joshua Davey's state-funded college scholarship solely because he chose to study a particular subject matter, religion, from a particular standpoint, through a lens of faith.

The record below reveals that, apart from Washington's viewpoint-based discrimination against faith-based religious

study, Promise Scholarships are awarded on straightforward, religiously neutral criteria: recipients must meet pre-set financial need standards; attend, at least half-time, an accredited college within Washington; and either be in the top 15% of their high school class, or attain a specified score on the SAT or ACT college entrance examinations. *See* Wash. Admin. Code 250-80-020(12) (JA 180). On the basis of these religiously neutral criteria, Mr. Davey initially was awarded a scholarship through a congratulatory letter signed by Washington's Governor Locke. JA 55-56. Mr. Davey chose to attend Northwest College, a Christian institution, in part because he is "a Christian…committed to living out [his] faith in every aspect of [his] life." JA 40. And largely for that same reason, once enrolled at Northwest, Mr. Davey declared a double major in business administration and pastoral ministries. JA 43. Upon learning of Mr. Davey's chosen pastoral ministries major, however, the State pirouetted and revoked Mr. Davey's scholarship. JA 97. The record facts thus make plain the character of Washington's exclusionary policy: Mr. Davey and other scholarship recipients may use Promise Scholarships for whatever college and course of study they choose, *except* if they choose to study one particular subject, religion, from one particular vantage point—that of faith.

2. These undisputed facts directly implicate an interconnecting web of basic doctrines arising under several constitutional provisions. Applying these interconnecting doctrines, the Court has held, time and again, that governmental discrimination based on religious distinctions triggers the closest, most searching judicial scrutiny. Laws of general applicability ordinarily embody and comply with the fundamental constitutional requirement of equal treatment and nondiscrimination. In contrast, laws of

particularized applicability, such as those targeting disfavored religious beliefs, practices, or groups, are almost always constitutionally infirm. Not only is the unconstitutionality of discriminatory law at the heart of the Court's Equal Protection jurisprudence, it has also animated the Court's Free Speech jurisprudence, *see Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), guided the development of recent Establishment Clause doctrine, *see Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997), and played a central role in the Court's most recent Free Exercise cases, *see Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

The simple, powerful command of nondiscrimination—equality under the law—thus separates out claims of those who demand preferential treatment or exemptions from generally applicable laws from those, like Mr. Davey, who ask for nothing more than judicial enforcement of the profound constitutional guarantees of evenhandedness. A vital principle that emerges from the Court's decisions is that the text-based Free Exercise guarantee *permits* (but does not require) the representative branches of government to protect religious liberty by adopting an attitude of "benevolent neutrality," *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), while at the same time it *prohibits* the judicial branch from carving faith-based exceptions to otherwise generally applicable, religiously neutral laws. *See, e.g., Smith*, 494 U.S. at 878. In other words, if the representative branches wish to act in neutral fashion to ease burdens on religiously defined communities, they may well

be able to do so. What those branches cannot do is single out for unfavorable treatment a faith-defined group of citizens, be they religious or irreligious.

3. The Washington constitution's Blaine Amendment—and the Promise Scholarship restriction it produced—constitutes precisely the type of invidious discrimination forbidden under this Court's decisions. Washington's legislature enacted a law providing scholarships (on a generally applicable, religiously neutral basis) in order to encourage Washington's most promising students to attend in-state colleges. This enactment was wholly unexceptionable. Washington's salutary, religiously neutral law was then infected, however, by the admixture of a constitutionally poisonous limitation—the discriminatory proviso that singles out faith-based perspectives for disparately unfavorable treatment. As explained below, this discriminatory restriction renders invalid under the Equal Protection and Establishment Clauses (among other constitutional doctrines) any action taken under its auspices, including the decision depriving Mr. Davey of his otherwise-merited scholarship.

4. Washington has no legitimate interests, much less compelling ones, in discriminating against faith-based religious study. It argues that Joshua Davey has no right to government funding for his religious studies. True enough. But Washington never addresses the dispositive point that, notwithstanding government's undoubted control over the public fisc, it may not wield fiscal authority in such a manner as to enact anti-religious, viewpoint-based funding restrictions. Washington's argument that discrimination based on religious views is justified by the State's strong policy of enforcing strict separation of church and state was put to rest over two decades ago in *Widmar v. Vincent*, 454

U.S. 263 (1981). Where, as here, any benefits flowing to religious organizations are solely the result of genuine private choice, Washington has *no* Establishment Clause interest in preventing *private* decisions directing individualized education benefits from being used for faith-based, religious study. By discriminating on the basis of religion, Washington runs afoul of this Court's decisions mandating evenhandedness towards religion and, in particular, its jurisprudence under the Equal Protection and Establishment Clauses.

ARGUMENT

I. MULTIPLE CONSTITUTIONAL PROVISIONS PROHIBIT DISCRIMINATION ON THE BASIS OF RELIGION

The Court has "time and again held that the government may not treat people differently based on the God or gods they worship, or do not worship." *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring). This fundamental principle of equal treatment transcends individual categories of doctrinal analysis. "[T]he Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Id.* at 715.

The Establishment Clause. The Establishment Clause has been the most frequent locus of decisions declaring that government may not discriminate in favor of or against religion in general, particular religions, or irreligion. The Court has held, in case after case, that "[g]overnment in our democracy, state and national, must be neutral in matters of

religious theory, doctrine, and practice." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). For "[t]he fullest realization of true religious liberty" requires that government "effect no favoritism among sects or between religion and nonreligion," and that it "work deterrence of no religious belief." *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 305-06 (1963) (Goldberg, J., concurring) (a "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious" is prohibited). Because the "First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion," government may "not be hostile to any religion or to the advocacy of nonreligion." *Epperson*, 393 U.S. at 104. As the Court has noted in summarizing its holdings, "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Lukumi*, 508 U.S. at 532; *see also McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

The Court applied this nondiscrimination principle in *Larson v. Valente*, 456 U.S. 228 (1982), to invalidate under the Establishment Clause a state statute imposing registration and reporting requirements on certain religious organizations. The statute did not withstand scrutiny, the Court explained, because it did "not operate evenhandedly" and effected "*selective* legislative imposition of burdens and advantages upon particular" religious groups. *Id.* at 253-54 (emphasis in original). The nondiscrimination principle also informed this Court's decision sustaining Congress's equality-of-access-to-facilities mandate in *Board of Education v. Mergens*, 496 U.S. 226 (1990). *Mergens* rejected the bid of a local school board that sought to

separate out religious voices and deny them access to facilities based on what was undeniably a rule demanding disparate and unfavorable treatment.

This long progression of holdings applies as much to programs that uniquely single out religion for special burdens (or exclusions from benefits) as to programs singling out religion for special aid. Indeed, the Court has long held that a state may not exclude individuals "from receiving benefits of public welfare legislation" merely "because of their faith, or lack of it." *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947); *see also Kiryas Joel*, 512 U.S. at 698 ("religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments"). Government thus violates the Establishment Clause when it denies benefits to individuals on the basis of their religious choices.

As one dimension of nondiscrimination, States are obliged, under this Court's doctrine, to guard against appearing to endorse any particular religious *or* irreligious point of view. In her original articulation of this aspect of nondiscrimination, Justice O'Connor wrote: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The Court's post-*Lynch* decisions make clear that, even in the context of aid programs (like the Promise Scholarship), government must avoid the appearance of endorsing particular religious or irreligious perspectives. Avoiding the implication of endorsement is usually accomplished by ensuring that benefits are provided directly to an appropriately, neutrally

defined class of citizens, who, in turn, direct that aid to privately selected religious or nonreligious organizations through a process of "true private choice." *Zelman*, 536 U.S. at 649. In such circumstances, any "perceived endorsement" of a religious or irreligious message "is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* at 652; *see also Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488-89 (1986); *Mergens*, 496 U.S. 226, 250 (1990). The Constitution's Establishment Clause guarantee is thus "respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (quoting *Rosenberger*, 515 U.S. at 839). That is this case.

The Free Exercise Clause. The anti-discrimination principle embedded in the Court's Establishment Clause jurisprudence finds its analogue in Free Exercise Clause decisions making equally plain that discrimination against religious choice or activity is impermissible. *See Lukumi*, 508 U.S. at 542 ("The Free Exercise Clause 'protects religious observers against unequal treatment'") (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring)). The Free Exercise Clause thus prohibits states from imposing "special disabilities on the basis of religious views or religious status," *Smith*, 494 U.S. at 877, or compelling a choice "between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981).

In *Lukumi*, the Court's most recent decision striking down a state law on Free Exercise grounds, the Court invalidated city ordinances regulating the ritual slaughter of animals because the "secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs." *Lukumi*, 508 U.S. at 524. Noting that "a law targeting religious beliefs as such is *never* permissible," *id.* at 533 (emphasis added), the Court declared that, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," *id.* at 532; *see also id.* at 534 (the "Free Exercise Clause protects against governmental hostility" toward religion). The state ordinances violated the Free Exercise Clause, the Court reasoned, because they imposed "gratuitous restrictions" on religious conduct and "singled out" conduct motivated by religious beliefs "for discriminatory treatment." *Id.* at 538.

Lukumi makes clear that under the Free Exercise Clause, as with the Establishment Clause, "[s]tate power is no more to be used so as to handicap religions, than it is to favor them." *Everson*, 330 U.S. at 18. Once again, the nondiscrimination principle commands evenhandedness. Government thus violates the Free Exercise Clause if it withdraws benefits under "an otherwise available public program" through discrimination against persons choosing to use their benefits for religious purposes or in religious contexts. *Thomas*, 450 U.S. at 716; *see also Smith*, 494 U.S. at 884 ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"); *Lyng v. N.W. Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 453 (1988) ("[t]he Constitution does not permit government to

discriminate against religions"); *Goldman v. Weinberger*, 475 U.S. 503, 513 (1986) (regulation held constitutional because "[i]t was not motivated by hostility against, or any special respect for, any religious faith"). A state violates the Free Exercise guarantee whenever it disqualifies applicants from receiving *generally available benefits* solely because of their religious beliefs. *See Hobbie*, 480 U.S. 136; *Thomas*, 450 U.S. 707; *Sherbert v. Verner*, 374 U.S. 398 (1963).

Judicial enforcement of this bedrock neutrality-based principle is in no wise inconsistent with fundamental values of majoritarian rule in policymaking. The Court has thus held that, "[i]n the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many people, the Government is entitled to wide latitude." *Bowen v. Roy*, 476 U.S. 693, 707 (1986); *see also Smith*, 494 U.S. at 883. Because government could not operate "if it were required to satisfy every citizen's religious needs and desires," *Lyng*, 485 U.S. at 452, the Court has been called upon to define circumstances under which regulations intended to advance neutral, secular goals might nonetheless "*indirectly* and *incidentally*" impose too high a burden on religion. *Bowen*, 476 U.S. at 706 (emphasis added); *compare Hernandez v. Comm'r*, 490 U.S. 680 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult) *with Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding free exercise challenge to state's compulsory school-attendance laws).

But that is far afield from the case at hand. Whatever the scope of the Free Exercise Clause when government imposes *indirect* and *incidental* burdens on religion, the Court has never wavered from the precept that, at bottom, government may not "discriminate against particular religious beliefs or

against religion in general." *Bowen*, 476 U.S. at 707-08; *Smith*, 494 U.S. 872, 877 (1990) (the government may not "impose special disabilities on the basis of religious views or religious status"). Such discrimination would "manifest a governmental hostility to religion [and] religious teachings" that would be "at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum v. Board of Educ.*, 333 U.S. 203, 211-12 (1948).

Freedom of Religious Speech. Parallel principles of nondiscrimination have also informed this Court's decisions in cases involving religious speech. Under the Free Speech Clause, a state may not exclude religious points of view from an open forum that the state itself has created. *See Good News Club*, 533 U.S. at 107-12. This principle, the Court has recognized, applies with undiminished force where the speech in question covers religious topics. *See Rosenberger*, 515 U.S. at 845-46; *Lamb's Chapel*, 508 U.S at 393-95; *Widmar*, 454 U.S. at 277.

In *Rosenberger*, for instance, the Court condemned the University of Virginia's exclusion of a Christian-focused student publication from financial assistance provided generally to all other student publications. *See* 515 U.S. at 831; *see also id.* at 852 (O'Connor, J., concurring). Denying funding to the group "discriminated on the basis of the magazine's religious viewpoint in violation of the Free Speech Clause." *Id.* at 852 (O'Connor, J., concurring). In addition, such discrimination would "risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845-46.

Rosenberger stands in an impressive, stare-decisis-deserving line of decisions giving expression to

the nondiscrimination principle—an unbroken line reaching from *Good News Club* back through *Rosenberger*, to *Lamb's Chapel*, to *Mergens*, and to the fountainhead *Widmar* decision. *Widmar* stands, above all, for the constitutional principle that government need not confer public benefits at all, but public benefits, once conferred, may not unjustifiably shut out religious points of view. 454 U.S. at 267.

The Equal Protection Clause. Finally, this Court's nondiscrimination principles have been applied under constitutional rubrics located entirely outside the First Amendment. Most obviously, discrimination based on religion implicates principles at the heart of the Equal Protection Clause. *See, e.g., Oyler v. Boles*, 368 U.S. 448, 456 (1962) (state law enforcement may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"). Simply put, government "must treat citizens as individuals, and not as members of racial, ethnic, or religious groups." *Missouri v. Jenkins*, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring). As Justice Frankfurter long ago explained, "to allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment." *Niemotko v. Maryland*, 340 U.S. 268, 284 (1951) (Frankfurter, J., concurring); *see also McDaniel*, 435 U.S. at 643-46 (White, J., concurring). Accordingly, "[w]hen a state distributes benefits unequally"—imposing burdens on some groups, but not others—"the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Zobel v. Williams*, 457 U.S. 55, 60 (1982).

Religious Accommodation. In light of this Court's oft-repeated strictures against discrimination based on

religious belief, practice, or viewpoint, it bears emphasis that the constitutional nondiscrimination rule in no way prevents government from taking into account the centrality, vitality, and diversity of religion in contemporary American life. So long as the government acts even-handedly, the political branches are free to take steps to relieve religious groups from the special burdens sometimes imposed by the law. *See Amos*, 483 U.S. at 334-35. The Court has "long recognized" that "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Id.* at 335 (quoting *Hobbie*, 480 U.S. at 144-45). It has recognized in particular that the Establishment Clause is capacious and flexible enough to allow a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* (quoting *Walz*, 397 U.S. at 669); *see also Zelman*, 536 U.S. at 669-70 (O'Connor, J., concurring). While always "bound to observe strict neutrality" between different beliefs, federal and state officials enjoy leeway, through the give-and-take of representative democracy, to experiment with laws designed to serve regulatory goals, yet accommodate religious belief and practice. *See Walz*, 397 U.S. at 669. As Justice Thomas recently noted, "[s]tates may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights" and so long as they "observe strict neutrality." *Zelman*, 536 U.S. at 678-79 (Thomas, J., concurring).

II. THE WASHINGTON SCHOLARSHIP PROGRAM UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF RELIGION

Application of these fundamental nondiscrimination principles manifestly condemns Washington's decision to strip financially needy students of scholarship funding based

on the religious viewpoints adopted in their studies. Most obviously, under this Court's case law, Washington has violated the Equal Protection and Establishment Clauses by discriminating on the basis of religious viewpoint.

A. Washington's Viewpoint-Based Restriction On The Use Of Promise Scholarship Funds Is Discriminatory In Both Purpose And Effect

In a wide variety of contexts, the Court, when asked to weigh a government program for evidence of unconstitutional discrimination, has focused on the program's primary purpose and effect. *See, e.g., Zelman*, 538 U.S. at 648-49 (Establishment Clause); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (Equal Protection Clause). Where government programs have had the forbidden purpose and effect of advancing or inhibiting religion, or burdening a suspect class of citizens, this Court has not hesitated to strike down such programs. Here, the court of appeals correctly determined that Washington's statute and regulations are discriminatory because they prohibit receipt of scholarship funds by students seeking to use them to study religion from a faith-based perspective.

1. The Manifest Purpose Of The Restriction Is To Discriminate

Any doubt that the Promise Scholarship program intentionally discriminates against religious faith is answered by the fact that the restriction is the consequence of Washington's version of the Blaine Amendment. State versions of the Blaine Amendment were adopted out of deep-seated animosity towards organized religion in general and Catholicism in particular. *See Mitchell*, 530 U.S. at 828-29 (plurality opinion) (discussing the Blaine Amendment and stating that "hostility to aid to pervasively

sectarian schools has a shameful pedigree that we do not hesitate to disavow"). Rather than protect religious liberty, as Washington suggests, the Blaine Amendment (like the invidious policies it has produced) was intended to substantially reduce religious freedoms. *See generally* Philip Hamburger, SEPARATION OF CHURCH AND STATE 296-334 (2002). As a state weapon aimed directly (and exclusively) at religious faith, the Blaine Amendment is an ugly remnant of a tragically dark side of the national experience.

Significantly, the incorporation of the Blaine Amendment into Washington's constitution was not the result of healthy social experimentation at the state level. To the contrary, the Amendment was effectively forced on Washington by Congress, which in 1876 required that all new states admitted to the Union include a provision for the establishment and maintenance of public schools that were "free from sectarian control." Robert F. Utter & Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 26 (2002). This provision was included in Section 4 of Washington's Enabling Act and served as a model for Article I, section 11 of Washington's Constitution. *See id.* The Congressional requirement that public schools be free from sectarian control, and its related principle of no aid to religion, was passed only following Congress's failed attempt to amend the federal Constitution to effect a total separation of church and state in a way never contemplated by the First Amendment. *See* Hamburger, SEPARATION, at 296-302.

In sharp contrast to the Blaine Amendment, which embodies hostility towards certain religious beliefs, the Founders fashioned the First Amendment to ensure that civil legislation did not discriminate on account of religious differences. *See* Hamburger, SEPARATION, at 12-14. At the

Founding, freedom of religion was seen to encompass both worship and similarly strong feelings of conscience. *See* Benjamin Franklin, *A New Version of the Lord's Prayer* (1768), *reprinted in* THE PAPERS OF BENJAMIN FRANKLIN, at 301 (William Wilcox *et al.*, eds., 1959) ("[w]e have in our Language no *proper Name* for God; the Word *God* being a common or general Name, expressing all chief Objects of Worship, true or false"). Accordingly, the First Amendment, with its promise of religious liberty, was not supposed to erect an impenetrable barrier between government and religion, but rather ensure equality of all rights held under law without regard to religious differences. *See* Hamburger, SEPARATION, at 96-97 (quoting Samuel Stillman, A SERMON 29 (Boston 1779) ("The authority by which he [*i.e.*, the 'magistrate'] acts he derives alike from *all the people*, [and] consequently he should exercise that authority *equally* for the benefit of *all*, without any respect to their different religious principles.") (emphasis in original)). By these lights, the Washington scholarship program's religious restriction was enacted for manifestly invalid reasons. Just like the viewpoint-based discrimination struck down in *Rosenberger*, Washington's restriction acts purposefully to burden certain religious beliefs and the individuals adhering to them.

2. The Effect Of The Restriction Is To Discriminate

The Promise Scholarship program also has a discriminatory effect. Whether one sees Washington's restriction as a regulation of conduct (Davey's training for the ministry) or of religious conviction (Davey's choices motivated by his belief), there can be no doubt that needy students eligible for Promise Scholarships, who would otherwise seek a theology degree and pursue a career in the

ministry, are given a financial incentive to choose some other degree and some other vocation. *Cf. McDaniel*, 435 U.S. at 631. ("The characterization of the exclusion as one burdening appellant's 'career or calling' and not religious belief cannot withstand analysis"). Washington's restriction entices students to avoid the educational prerequisites for religious vocations by restricting scholarship funding based on religious viewpoint. Financially needy, academically gifted high-school graduates are told, in effect, that a scholarship can be theirs—provided they refrain from studying theology from a perspective of faith. Washington thus does exactly what the multiple, related constitutional bars against religious discrimination prohibit: it "impose[s] special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877.

Besides creating disincentives for choosing careers in the ministry, Washington's restriction has other pernicious effects. Most fundamentally, restricting funding for faith-based religious study works against the Promise Scholarship's primary goal of promoting higher education. Because students, particularly poorer students, active in their communities of faith are likely to "seek more education," *see* Yong Dai, *Educ. Plans After High Sch.: A Nat'l Survey of High Sch. Seniors*, 30 J. OF RES. & DEV. IN EDUC. 1, 22 (1996), Washington's discriminatory restriction affirmatively undercuts the Promise Scholarship program's core educational objectives.

More subtly, the exclusion of religious study from Promise Scholarship funding creates a false and invidious impression that religious study is somehow less worthy than other avenues of inquiry. This condescension can be seen in Washington's briefing, where it deems the religious perspective something less than truly "academic." Pet Br.

12. This secularist snobbery has no place in our law. Partly in response to the pervasiveness of this elitist condescension, some scholars have gone so far as to assert that "the self-conscious cultivation of a spiritually informed ethos of inquiry" is "*indispensable* to learning and teaching." Mark R. Schwein, EXILES FROM EDEN: RELIGION AND THE ACADEMIC VOCATION IN AMERICA 45 (1993) (emphasis added). "Whether we look to the Platonic Academy or to the teachers of ancient Israel or to St. Augustine at Cassiciacum or to the medieval university or to Pico della Mirandola's disputatious Florence, we will find learning flourishing in communities formed by the conscious practice of spiritual values." *Id.* at 45-46 (arguing that "'enlighted' secular rationalism" has become a favored viewpoint in college and university education); *see also Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979) (public education helps prepare "individuals for participation as citizens, and in the preservation of the values on which our society rests").

But this case is not the venue for that ongoing, and increasingly lively debate. For present purposes, the Court need only recognize that the purposeful *exclusion* of faith-oriented religious study from the approved menu of educational options communicates, not so subtly, a message of endorsement of the non-faith (and anti-faith) approaches to religious inquiry while at the same time communicating a concomitant, statist disapproval of faith-based approaches. As Mr. Davey succinctly put it, "I felt that I was a second-class citizen in the eyes of the state." JA 46. That is Washington's message, and it is a profoundly unconstitutional one.

B. Washington's Viewpoint-Based Restriction Fails To Pass Muster Under Multiple Constitutional Doctrines

The court of appeals held, rightly, that Washington's discriminatory restriction fails to pass muster under the Free Exercise Clause. But quite apart from the Free Exercise and Free Speech analysis undertaken by the court below, the state-imposed exclusion fails muster under both the Equal Protection and Establishment Clauses. *See* Compl. (JA 12-13) (pleading Equal Protection and Establishment Clause claims). This Court's decisions under both Clauses make clear that because Washington must act with an evenhanded respect for the diverse religious (and irreligious) beliefs of its citizens, its Promise Scholarship exclusion is unconstitutional.

At the outset, independent of fundamental First Amendment shortcomings, Washington's restriction violates the Equal Protection Clause of the Fourteenth Amendment. States presumptively violate equal protection where, as here, they create classifications resting on suspect grounds, such as race or religion, and then afford disparate treatment to different citizens based on those classifications. In such circumstances, a state must come forward with some compelling government interest to justifying the disparity and prove that its law is narrowly tailored to achieve that interest. *See, e.g.*, *Lukumi*, 508 U.S. at 546; *Grutter v. Bollinger*, 123 S. Ct. 2325, 2338 (2003). Just as this Court gives the "most exacting scrutiny" to laws that "make classifications based on race, or on the content of speech," so too, it must "strictly scrutinize governmental classifications based on religion." *Smith*, 494 U.S. at 886 n.3; *see also Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring).

The relevance of the Equal Protection Clause to instances of religious discrimination has not gone unrecognized. In *McDaniel v. Paty*, for instance, Justice White in concurring in the judgment emphasized that Tennessee was prohibited by the Equal Protection Clause from discriminating against clergymen by barring them from holding public office. *See* 435 U.S. at 643-46 (White, J., concurring) (equal protection analysis is apposite because the right to seek elective office is fundamental). Similarly, in *Niemotko v. Maryland*, Justice Frankfurter recognized that burdening religious conduct, precisely *because it is religious*, constitutes an Equal Protection violation: "To allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of law forbidden by the Fourteenth Amendment." 340 U.S. at 284 (Frankfurter, J., concurring). In this case, Washington unapologetically revoked Mr. Davey's Promise Scholarship solely because he chose to study religion from the standpoint that comes most natural to him as a Christian "committed to living out [his] faith." JA 40. Washington thus invidiously classified him as "too religious" to be eligible for the generally available aid otherwise on offer. *Cf.* Wash. Rev. Code 28B.10.812 ("All student financial aid shall be granted…without regard to the applicant's race, creed, color, religion, sex or ancestry") (JA 133).

Washington protests, of course, that it holds nothing against religious *people* like Mr. Davey; it is only their religious *ideas* it disfavors. According to Washington, "Davey was *not* denied the scholarship because he identified himself as a Christian," Pet. Br. 11 (emphasis added); he was denied the scholarship because he wanted to study "theology" from a standpoint of faith. *See id.* at 7 (students

may not use the Promise Scholarship "to pursue a theology degree"). But this would-be distinction makes no difference. It was religious animus that initially drove Congress to force Washington's Blaine Amendment, Article I section 11, into the Washington Constitution. *Cf. Romer v. Evans*, 517 U.S. 620, 634 (1996) (laws born of "animosity toward the class of persons affected" cannot "constitute a legitimate governmental interest"). And a State's decision to accomplish invidious ends targeting a particular subgroup is never saved by claims that the State has accomplished the invidious ends via facially neutral means. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) ("The Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections.") (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)); *Gomillion*, 364 U.S. at 342 (same); *see also Sherbert*, 374 U.S. at 405 (a State may not impose conditions on "even a gratuitous benefit" if to do so would "inevitably deter[] or discourage[] the exercise of First Amendment rights...and thereby threaten[] to produce a result which the State could not command directly") (internal quotations omitted). The *only* students who might wish to study religion from a standpoint of faith are those, like Mr. Davey, who already accept, or who might potentially come to accept, the validity of that worldview. That group of potential scholarship recipients is a discrete, identifiable, religiously defined subgroup of Washington citizens. Washington's restriction is thus perfectly tailored to burden *only* this discrete minority defined by religion.

More fundamentally, to accept at face value Washington's protestations that it disfavors religious *ideas*, not religious *people*, does nothing to save its discrimination from invalidity. The Court has given exacting scrutiny not

only to laws that discriminate based on suspect classes of citizens, but also to laws that burden fundamental rights. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988). Although fundamental rights analysis has often been applied most vigorously in the context of un-enumerated rights, *see, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 672 (1966) (right to vote), the Court has also, on occasion, applied the fundamental rights prong of equal protection to enumerated rights, *see, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (free speech). The right of citizens to be free from disabilities imposed solely because of their religious views is so deeply rooted in this Nation's history and traditions, that it deserves such heightened protection.

In any event, the Establishment Clause, quite apart from the Equal Protection Clause, also imposes an affirmative obligation on government to accord equal respect to the diverse religious convictions of its citizens. Just as government may not discharge government employees solely because of their partisan political preferences, *see Branti v. Finkel*, 445 U.S. 507 (1980), so too it may not take an official position on the debate between those who view religion "from a religious perspective" and those who do not. *See Rosenberger*, 515 U.S. at 830-31 ("It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint").

The Establishment Clause, and its proscription of *any* official governmental view on matters of religion, thus creates a bright-line, easily applied rule forbidding the government from adopting *any* views on matters of religious belief. *See Rosenberger*, 515 U.S. at 839. Unlike the context of freedom of thought and expression, where

viewpoint-based distinctions are sometimes thought acceptable (a public health campaign against drunk driving need not be coupled with a campaign extolling the coronary benefits of wine drinking), matters of religious belief, by definition, may not give rise to any sort of differential treatment. Instead, government simply may not "prefer one religion to another, or religion to irreligion." *Kiryas Joel*, 512 U.S. at 703.

In light of the above, Washington's pleas that it revoked Mr. Davey's scholarship based on a disfavor of *ideas*, not *persons*, is entirely beside the point. Washington could, of course, provide scholarships to encourage more students to become engineers, nurses, doctors, or journalists. If it did, Mr. Davey would have no complaint. *See Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Rosenberger*, 515 U.S. at 830 (distinguishing between content- and viewpoint-based discrimination). But as this Court has long-recognized, the fact that government need not pay for something in the first place does not mean that the Establishment Clause permits it to deny funding based on religious belief. *See Widmar*, 454 U.S. at 267-68; *Rosenberger*, 515 U.S. at 843. As the court below correctly reasoned, Washington had no duty to provide scholarship funding at all, but once it "decided to provide Promise Scholarships to all students who meet objective criteria, it had to make the financial benefit available on a viewpoint neutral basis." Pet. App. 19a. The nondiscrimination principle requires no less.

III. WASHINGTON HAS NOT ADVANCED ANY LEGITIMATE REASON FOR DISCRIMINATING ON THE BASIS OF RELIGION

Washington has no meaningful defense for its discriminatory regime. It instead seeks to side-step the Constitution, arguing, first, that Mr. Davey has no right to

have the state fund his religious studies and, second, that it is free to implement stricter separation of church and state than the Establishment Clause provides. For reasons set forth below, neither argument succeeds.

A. Washington Has No Constitutionally Protected Interest In Selectively Funding Certain Religious Views

Relying heavily on this Court's decisions in *Rust v. Sullivan*, 500 U.S. 173 (1991), *Regan v. Taxation Without Representation of Washington*, 461 U.S. 540 (1983), *Maher v. Roe*, 432 U.S. 464 (1977), and related cases, Washington first argues that it should have completely free rein to define the limits of its Promise Scholarship program. *See* Pet. Br. 23-31. In Washington's view, it may strip funds from scholarship recipients who choose to study religion from a faith-based perspective because the denial of funding does not stop those students from practicing any protected constitutional right.

This odd interpretation of the Establishment Clause has never won acceptance in First Amendment jurisprudence, and rightly so. At the outset, the cases relied on by Washington are readily distinguished; they all involve neutral restrictions on government funding either for private *conduct* or for *content*-defined (not viewpoint-defined) categories of non-religious expression. *See* Pet. Br. 23-24 (citing *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003); *Regan*, 461 U.S. 540 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher*, 432 U.S. 464 (1977)). None involve viewpoint-based restrictions, much less viewpoint-based restrictions affecting religious issues, much less still viewpoint-based restrictions on the availability of individualized benefits. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-43 (2001).

To be sure, the Court has identified a variety of individual rights to engage in private *conduct*—including, for instance, rights to choose abortion, engage in certain types of private sexual behavior, and live in nontraditional families. *See Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Such un-enumerated rights have never been thought, however, to include corollary rights of public funding. Although women have a judicially created, limited right to choose abortion, *see Roe*, 410 U.S. at 155, they have no right to have the government pay for that abortion, *see Maher*, 432 U.S. at 469. So too, although the poor have a judicially recognized right to live in nontraditional family relationships, *see Moore*, 431 U.S. at 506, they have no right to government welfare programs that may help facilitate such relationships, *see Dandridge v. Williams*, 397 U.S. 471 (1970). More to the point, although the Court has held that citizens' free exercise rights extend to ritual animal slaughter, *see Lukumi*, 508 U.S. at 531, the celebrants have no right to government funding of the ceremonies at which the bloodletting occurs.

But these well-settled principles, which provide government flexibility to decide whether to fund constitutionally protected *conduct*, give way to other principles in contexts involving political freedoms of thought and speech, and religious freedom of conscience. In these contexts, the constitutional prohibition against viewpoint discrimination comes into play affirmatively to bar the government from taking official positions—for example, via differential funding rules—on core issues of politics or *any* issue of religion. *See, e.g., Rutan v. Republican Party of Ill.*, 497 U.S. 62, 72 (1990) ("even though a person has no 'right' to a valuable governmental benefit and even though the

government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely") (citations omitted). Washington makes much of the fact that *Regan* upheld against freedom of speech claims Congress's decision to extend a charitable tax subsidy to veterans' lobbying organizations but no other lobbying organizations. *See Regan*, 461 U.S. at 546-47. But that case would have been very different if, like Washington here, Congress had extended benefits to some but not others based on differences of religious viewpoint—for instance, if Congress had exempted from tax only groups composed of religiously committed veterans whose beliefs impelled them toward support for the military's policies disfavoring homosexual conduct by soldiers. *Cf. Taxation Without Representation v. Regan*, 676 F.2d 715 (D.C. Cir. 1982).

Of course, as Washington argues, Mr. Davey has no right to a scholarship at all, *see* Pet. Br. 23-24, and hence Washington's constitutionally fatal discrimination might indeed be remedied by eliminating Promise Scholarships altogether. But that decision, if ever it is to come, is for the Washington legislature. This Court's practice has been to eschew such scorched-earth, Shermanesque remedies in eliminating invidious discrimination. In *Speiser v. Randall*, on which Washington relies, the Court did not strike the challenged tax exemption altogether; instead, it eliminated the requirement that the exemption be conditioned on a veteran's willingness to take an oath of political orthodoxy. *See* 357 U.S. 513, 531-32 (1958). Similarly, in *Velazquez*, the Court's response to a discriminatory funding restriction, was not to enjoin the operation of the Legal Services Corporation, but to enjoin the *restrictions* placed on the viewpoints its lawyers could assert. *See* 531 U.S. at 549. So too here, the appropriate judicial response is not to eliminate

Promise Scholarships, but to enjoin Washington to award them on a viewpoint-neutral basis by expanding their permissible uses to encompass the study of *all*, not just some, of the religious views held by Washington citizens.

In sum, Washington's error "lies in focusing on the money that is undoubtedly expended by the government rather than on the nature of" the Promise Scholarship program. *Rosenberger*, 515 U.S. at 843. Although *Regan* upheld a *viewpoint-neutral* funding subsidy for lobbying on veterans' issues, there can be little doubt that the Court would have struck down *viewpoint-based* subsidies tied, for instance, to an organization's support for the government's party line on controversies like women's role in the military. *Cf. FCC v. League of Women Voters*, 468 U.S. 364 (1984). While necessarily enjoying wide latitude to define the limits to which it will or will not fund *conduct*, *see Rust*, 500 U.S. at 194, government may not make viewpoint-based funding decisions when it otherwise provides the funding on neutral, objective criteria. *See Velazquez*, 531 U.S. at 541; *Rosenberger*, 515 U.S. at 833. Indeed, Washington is ultimately forced to concede that restrictions, like the Promise Scholarship restriction, designed to "single out a particular idea for suppression because it [is] dangerous or disfavored" are constitutionally improper. Pet. Br. 30 (citing *Velasquez*, 531 U.S. at 541). That concession, standing alone, suffices to doom Washington's funding restriction.

B. Eliminating Washington's Discrimination Against Religion Would Provide More, Not Less, Separation Of Church And State

Washington argues that its discriminatory exclusion is justified by the State's strong policy of enforcing a strict separation of church and state. *See* Pet. Br. 31. But this argument profoundly misunderstands the relationship

between the Free Exercise and Establishment Clauses. Far from being in "internal tension," as a previous generation of this Court's precedents had wrongly assumed, *see Norwood v. Harrison*, 413 U.S. 455, 469 (1973), the two constitutional provisions constitute congruent facets of a unified regime of protecting religious liberty and freedom of conscience.

As the Court recognized in *Zelman*, in contexts of individualized benefits programs, the circuit between government and religion is broken where, as here, any aid to religion is the result of genuine, private choices. *See* 536 U.S. at 652. The *Zelman* Court made clear that "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Id.* at 655. Put simply, "[i]f the religious, irreligious, and areligious are all alike eligible for government aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *Mitchell*, 530 U.S. at 809.

As long as the circuit between government and religion is broken by genuine private choice, as it would be under a nondiscriminatory Promise Scholarship program, Washington can have no legitimate Establishment Clause interests in preventing funding from reaching the study of religion from the perspective of faith. *Cf. Good News Club*, 533 U.S. at 113 (a State cannot justify viewpoint discrimination based on a nonexistent interest in avoiding an Establishment Clause violation). Any such interest would be no more legitimate than a purported state interest in preventing citizens from using housing vouchers to relocate close to a place of worship; or preventing the use of food

stamps to buy food for sacramental meals; or preventing government employees from donating their government-paid salaries to a church, synagogue, or mosque. *Cf. Witters*, 474 U.S. at 486-87 (a State may issue a paycheck to an employee, "who may then donate all or part of that paycheck to a religious institution").

With no Establishment Clause interests whatever in preventing funding from being put to religious uses through genuinely private decisions, the predominant and only Establishment Clause value Washington has at stake is the principle of neutrality between religious beliefs. But whatever room there may be between the Establishment and Free Exercise Clauses, neither clause provides any "warrant for discriminating *against* religion." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring) (emphasis in original). The proper standpoint is "government impartiality, not animosity, toward religion." *Id.* at 718. Accordingly, going beyond what the Establishment Clause requires, Washington has failed to live up to what it minimally demands.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

KENNETH W. STARR
Counsel of Record
ROBERT R. GASAWAY
ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Attorneys for Amicus Curiae
The Fairness Foundation

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